Supreme Court, U.S.
FILED

No. _____

10105 2 FEB 14 2011

OFFICE OF THE CLERK

In The

Supreme Court of the United States

In re KENT E. HOVIND,

Petitioner.

On Petition For Writ Of Mandamus
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF MANDAMUS

KENT E. HOVIND
#06452-017
FCI JESUP
FEDERAL CORRECTIONAL INSTITUTION
2680 301 South
Jesup, GA 31599

Petitioner, Pro Se

QUESTION PRESENTED FOR REVIEW

Does the United States District Court have the right to misrepresent illegal and erroneous pretrial and trial procedures to improperly arraign a Citizen of the United States of America?

PARTIES TO THE PROCEEDING

The Parties to the proceeding are:

KENT E. HOVIND, an individual, on behalf of himself as an inmate confined in an institution and is not represented by counsel;
THE UNITED STATES OF AMERICA

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I.

CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

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UNITED STATES OF AMERICA v. KENT E. HOVIND (Eleventh Circuit, June 30, 2010)

II.

JURISDICTION

This Honorable Court has jurisdiction to issue extraordinary writs under 28 U.S.C. § 1651(a) and U.S. Supreme Court Rule 20 (especially) "except in certain narrowly defined circumstances" where extreme violations have occurred.

Mandamus is available to any Petitioner who has a clear, legal, substantial and immediate right to have this Honorable Court compel the District Court to perform their duties where the duties are clear and ministerial. The Petitioner has no other meaningful or reasonable adequate and speedy remedies. This Petition for Writ of Mandamus filed with the Federal

Appellate Court could not be premature on the grounds that the Petitioner has not exhausted all of his administrative remedies, because there are no other administrative remedies available.

The situation, if left as is, will severely prejudice the Petitioner, critically affecting the disposition of this case and would be a direct violation of Petitioner's due process of law under the 5th Amendment.

The United States Supreme Court has the right of original jurisdiction in the matter of illegal misrepresentation and erroneous pretrial and trial procedures due to a Citizen of the United States of America having been improperly arraigned.

III.

CONSTITUTIONAL PROVISIONS

Article V, United States Constitution in pertinent part provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

Article XIV, Section 1, United States Constitution in pertinent part provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

> law; nor deny to any person within its jurisdiction the equal protection of the laws.

IV.

STATUTES INVOLVED

Title 28, U.S.C., Section 455(a) states:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Title 28, U.S.C., Section 455(b)(5)(i) in pertinent part states:

> He shall also disqualify himself . . . where he . . . is a party to the proceeding, or an officer, director or trustee of a party.

This Honorable United States Supreme Court has jurisdiction to issue extraordinary writs under 28 U.S.C. § 1651(a) "except in certain narrowly defined circumstances" where extreme violations have occurred.

V.

STATEMENT OF THE FACTS

This Honorable Supreme Court of the United States must correct the grave miscarriage of justice that occurred in this case, pursuant to *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944); *United States v. Beggerly*, 524 U.S. 38 (1998).

The Petitioner fulfills the five (5) elements of an "independent action" which are:

1.) The judgment should not, in equity and good conscience, be enforced. A judgment based on total lack of jurisdiction is not equitable and would shock a good conscience as in this instant case.

2.) The Petitioner has valid defenses to the alleged cause of action on which the judgment is founded. The Petitioner's defenses are based on long established criminal law principles with numerous U.S. Supreme Court and Appellate Court endorsements.

3.) There was fraud, accident or mistake which prevented the Petitioner in the judgment from obtaining the benefit of his defense. Also, you hire and pay an attorney to represent you and you truly think that he would be working in your best interest, instead of the government's. From the evidence of the Assessments, it shows that my attorney did not question, research or challenge any of the procedures of pretrial hearings, the grand jury indictment, constructive amendments at trial or petit jury instructions. Therefore, the attorney committed breach of contract and fraud on the Petitioner in this instant case.

4.) There was no fault or negligence on the part of the Petitioner. The Petitioner not being trained in criminal law could not have reasonably known that his attorney was ignorant, incompetent, disloyal and deceptive at the time of pretrial and trial.

5.) There may be no adequate remedy of law at this time other than this "independent action."

This Petition for Writ of Mandamus should be warranted because the Petitioner can show sufficient exceptional circumstances. This Mandamus qualifies as a member of non-final orders that must be appealable under the collateral order doctrine.

Under the collateral order doctrine, an order must:

1.) **Conclusively determine the disputed question.**

The District Court can definitely decide before trial whether the U.S. Magistrate Judge has Constitutional authority to conduct a pretrial arraignment proceeding for the Defendant without written or verbal consent from the Defendant and over Defendant's repeated objections. At said arraignment the Magistrate Judge ignored the jurisdictional challenge and changed the Defendant's plea without consulting an Article III Judge or answering Defendant's jurisdictional challenge. The District Judge ruled that a U.S. Magistrate Judge can conduct the arraignment and alter defendant's plea without consent and over the Defendant's objections. Allowing this authority to a Magistrate Judge is contrary to the U.S. Constitution, U.S. Supreme Court precedent and the Federal Rules of Criminal Procedure. This ruling is separate and apart from any merit or other jurisdictional issues.

2.) **Resolve an important issue completely separate from the merits of the action.**

The issue of conducting a pretrial arraignment by a U.S. Magistrate Judge without consent of the Defendant is not the same or close to the merits of the action.

3.) **Be effectively unreviewable on appeal from a final judgment.**

There would be no effective appeal from the legal harm and damage done by being arraigned before a U.S. Magistrate Judge without consent. Proper constitutional rights and statutes would not have been upheld and maintained. The government was able to take unfair and unjust advantage of the situation when an Article III Judge should have been making rulings, decisions and recommendations.

At the Arraignment of the Petitioner, the following vital and critical functions were or should have been performed that required an Article III Judge to be presiding; to wit:

1.) Petitioner must acknowledge receipt of the copy of the grand jury indictment.

2.) Petitioner must be advised of the right of counsel.

3.) Petitioner must be advised of his/her constitutional rights.

4.) Petitioner must be advised of the criminal charges.

5.) Petitioner must be advised of possible criminal penalties.

6.) Petitioner must be afforded an opportunity to ask critical questions involving technical criminal matters that could only be answered by an experienced and knowledgeable Article III Judge.

7.) Petitioner must be advised of time periods to file additional motions.

8.) Petitioner's bail must be set.

9.) Special conditions for Petitioner's release must be determined.

The Petitioner is also entitled to a ruling on his Petition for Writ of Mandamus under the All Writs Act, 28 U.S.C. § 1651 guided by five (5) principles:

1.) **The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he desires.**

There are irreversible harms and damages that have taken place by being arraigned by a U.S. Magistrate Judge *without consent* by the Defendant instead of an Article III Judge. An arraignment is a critical stage in a criminal proceeding. There is potential for substantial prejudice to the Defendant's rights that inhere. A criminal defendant has a right to have all critical stages of trial conducted by a person *with jurisdiction to preside*. The harmless error analysis does not apply in a felony case. *In re Morrissey*, 717 F.2d 100 at 102 (3rd Cir. 1983) and *Gomez v.*

United States, 104 L.Ed.2d 923 (1989) and *Government of the Virgin Islands v. Williams*, 892 F.2d 305 at 309 (3rd Cir. 1989); not only did the Magistrate lack jurisdiction to preside at the arraignment proceeding, but could not rule on the most important aspect of the proceeding.

The government may cite *U.S. v. Gochis*, 256 F.3d 739, 742 (7th Cir. 2001). The harmless error analysis does not apply as changing a plea and ignoring a clear jurisdictional challenge certainly affects Defendant's substantial Constitutional rights to be arraigned before a person authorized by the Constitution and Congress to conduct felony trial proceedings. In the *Gochis* case, "Gochis expressly consented to the magistrate judge when he and his attorney signed the waiver." No such consent exists in Petitioner's instant case.

Arraignment for probable cause and advice as to a defendant's rights are provided by law and are regarded as fundamental; *Kent v. United States*, 383 U.S. 541, 16 L.Ed.2d, 84 S.Ct. 1045 (1966). The arraignment is the procedure that shall precede the plea. *Johnson v. U.S.*, 56 L.Ed. 1142 (1912). Rule 10 of the Federal Rules of Criminal Procedure is designed not only to safeguard important rights of Petitioner but its observance serves also to protect proper administration of criminal law. *Gundlach v. U.S.*, 262 F.2d 72 (1959), Cert. Denied, 79 S.Ct. 1283, 360 U.S. 904, 3 L.Ed.2d 1255 (1959). Under federal

law an arraignment is an indispensable condition to trial itself, the preliminary state where the accused is informed of the indictment and pleads to it, thereby formulating issues to be tried. *Anderson v. U.S.*, 352 F.2d 945 (D.C. Cir. 1965).

Arraignment accordance with Rule 10 is intended to be a safeguard for due process and failure to observe this safeguard amounts to denial of due process, and the court is deprived of jurisdiction. *Merritt v. Hunter,* 170 F.2d 739 (10th Cir. 1948). Arraignment in a federal criminal prosecution is a vital part of the criminal process, *McConnell v. U.S.*, 375 F.2d 905 (1967).

2.) **The Petitioner will be damaged or prejudiced in a way not correctable on appeal.**

See arguments under Item 1.) above.

3.) **The district court's order is clearly erroneous as a matter of law.**

The District Court ignored numerous U.S. Supreme Court and Appellate Court decisions. When the District Court was construing an ambiguous criminal law, the Rule of Lenity directs the court to have resolved the ambiguity in favor of the Defendant.

Justification for the Rule of Lenity is that it reduces the potential for prosecutorial abuse and encourages clear statutes, therefore promoting the rule of law. This rationale is mentioned less often, but does appear in judicial opinions. *United States v. Kozminski*,

487 U.S. 931, 952 (1988) (describing one "purpose[ ] underlying the rule of lenity" as "to minimize the risk of selective or arbitrary enforcement"). The Honorable Court applies the Rule of Lenity in a predictable and principled fashion as a strong presumption against the criminalization of innocent conduct.

4.) **The district court's order manifests a persistent disregard of federal rules.**

The District Court has no federal rule to allow a U.S. Magistrate Judge to preside over an arraignment without the Defendant's consent and over his objection, yet this was done.

5.) **The district court's order raises important problems.**

There is no jurisdiction with a U.S. Magistrate Judge in an arraignment without consent. This is a jurisdictional challenge. There is no time limit to challenge jurisdiction.

The judge has a duty to continually inspect the record of the case, and if subject-matter jurisdiction does not appear at any time from the record of the case, then he has the duty to dismiss the case as lacking subject-matter jurisdiction. Should a judge act in any case in which he does not have subject-matter jurisdiction, he is acting unlawfully, *U.S. v. Will*, 449 U.S. 200, 216, 101 S.Ct. 471, 66 L.Ed.2d 392, 406 (1980); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404, 5 L.Ed. 257

(1821), and without any judicial authority. Since a void order has no legal force or effect there can be no time limit within which to challenge the order or judgment.

VI.

STATEMENT OF THE ISSUES

1. Whether Defendant's Constitutional rights were violated and whether a U.S. Magistrate Judge has authority to conduct arraignment proceedings and alter a Defendant's plea to avoid a clear jurisdictional challenge without consent and over Defendant's repeated objections.

2. Whether the case should have been dismissed before trial when said arraignment proceeded without answering the jurisdictional challenge.

3. Whether the case should now be dismissed when the *Pro Se* Petitioner renews his jurisdictional challenge that his former lawyer as representative failed to pursue at arraignment and trial.

VII.

STATEMENT OF RELIEF SOUGHT BY PETITIONER

By this Petition for Writ of Mandamus, Petitioner seeks an order from this Honorable United States Supreme Court directing the Honorable District

Court and Honorable Appellate Court to acquit and vacate Defendant's convictions based on procedural errors at pretrial and trial and for failure to properly arraign the Defendant and to accept the Independent Action that was filed by Petitioner.

VIII.

REASONS WHY THE WRIT SHOULD ISSUE

The Petitioner in this case was arraigned before a Magistrate Judge under Federal Rules of Criminal Procedure, Rule 10 in his arraignment proceedings. The Petitioner did not give consent to be arraigned before a Magistrate Judge and in fact questioned the legality of the same. The Defendant entered a plea challenging jurisdiction. The U.S. Magistrate Judge ignored the jurisdictional challenge without consulting an Article III Judge and changed Defendant's plea over his repeated objections. The Honorable District Clerk did not send consent forms to the Petitioner as required by local rules of the court nor did the Petitioner consent verbally or in writing for a U.S. Magistrate Judge to preside over the arraignment or to change his plea. In fact, the Honorable District Clerk did not send consent forms to the Petitioner as required by local rules of the Court. The Petitioner did not verbally or in written form consent to a Magistrate Judge presiding over the arraignment. Nor did the Magistrate Judge offer to have the arraignment presided over by an Article III District Judge.

The Magistrate Judge is *not* an Article III Judge according to the U.S. Constitution and cannot conduct vital critical criminal proceedings where substantial jurisdiction and due process rights may be affected; see U.S. Constitution Article III. The Magistrate Judge assumed personal and subject matter jurisdiction over the Petitioners' Arraignment. He made discretionary and judgment decisions and acted in a manner strictly limited to an Article III Judge.

The Fifth Circuit Court of Appeals in the case of *U.S. v. Johnston*, 258 F.3d 361 (5th Cir. 2001) ruled that a Magistrate Judge cannot conduct vital criminal felony proceedings even with the consent of the defendant. The Petitioner in this case was allegedly arraigned before a Magistrate Judge *without* the informed consent of the defendant. The Magistrate judge was *not* an Article III judge as demanded by the U.S. Constitution. An arraignment proceeding is a vital criminal proceeding under the law.

Most notably, the Defendant's consent significantly changes the constitutional analysis. As explained in Part IV, infra, concluding that there is no Article III problem when a district court judge permits a magistrate to conduct *voir dire* in accordance with the Defendant's consent.

The Defendant was not provided proper methods and procedures that are set out by the Federal Rules of Criminal Procedure. The District Court did not have jurisdiction to even try the criminal case.

IX.

CONCLUSION

THEREFORE, IT IS Prayed that this Honorable Supreme Court of the United States enter an Order to acquit and vacate Defendant's convictions based on procedural errors at pretrial and trial for failure to properly arraign the Defendant and to accept the Independent Action that was filed by Petitioner with prejudice.

The Petitioner also requests that Findings of Fact and Conclusions of Law be included with any and all rulings on the above rulings or request.

Respectfully submitted,

KENT E. HOVIND
#06452-017
FCI JESUP
FEDERAL CORRECTIONAL INSTITUTION
2680 301 South
Jesup, GA 31599
Petitioner, Pro Se

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE
COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

For rules and forms visit
www.call.uscourts.gov

July 20, 2010

Kent E. Hovind
Federal Satellite Camp
Box 725
Edgefield, SC 29824

Appeal Number: 10-12243-C
Case Style: In re: Kent E. Hovind
District Court Docket No: 3:06-cr-00083-MCR-1

The enclosed order has been entered. No further action will be taken in this matter.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Gerald B. Frost, C
Phone #: (404) 335-6182

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES
OF AMERICA

vs.

KENT E. HOVIND /

Case Nos.
3:06cr83/MCR
3:10cv487/MCR/EMT

ORDER

Before the court are Defendant's motions titled "Defendant-in-Error Petition to Unseal and Read All Grand Jury Information" (Doc. 374); "Motion to Amend Defendant's [Reply] to Government's Response to Defendant's Motion to Release on Bond" (Doc. 375); and "Petition for Production of Specific Brady Material" (Doc. 377).

As to the "Motion to Amend Defendant's [Reply] to Government's Response to Defendant's Motion to Release on Bond" (Doc. 375), the motion is **DENIED**. Defendant may not amend piecemeal his reply to the Government's response to his motion for release on bond (Doc. 372). Moreover, there is no basis for granting the sanctions demanded; also, if the district court adopts this court's report recommendation that the motion for release on bond be denied (*see* Doc. 373), the relief sought will be moot.

As to Defendant's other two motions, the Government shall respond to these motions either in its response to Defendant's pending § 2255 motion

(which response is due no later than February 14, 2011) or by separate response filed earlier.

Accordingly, it is **ORDERED** that:

1. The "Motion to Amend Defendant's [Reply] to Government's Response to Defendant's Motion to Release on Bond" (Doc. 375) is **DENIED**.

2. The Government shall respond to the motions titled "Defendant-in-Error Petition to Unseal and Read All Grand Jury Information" (Doc. 374) and "Petition for Production of Specific Brady Material" Doc. 377) either in its response to Defendant's pending § 2255 motion (which response is due no later than February 14, 2011) or by separate response filed earlier.

DONE AND ORDERED this 11th day of January 2011.

/s/ Elizabeth M. Timothy
ELIZABETH M. TIMOTHY
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

UNITED STATES OF AMERICA

vs.

KENT E. HOVIND /

Case Nos.
3:06cr83/MCR
3:10cv487/MCR/EMT

ORDER

This cause comes on for consideration upon the magistrate judge's Report and Recommendation dated January 3, 2011. (Doc. 373). The parties have been furnished a copy of the Report and Recommendation and have been afforded an opportunity to file objections pursuant to Title 28, United States Code, Section 636(b)(1). I have made a *de novo* determination of any timely filed objections.

Having considered the Report and Recommendation, and any objections thereto timely filed, I have determined that the Report and Recommendation should be adopted.

Accordingly, it is now **ORDERED** as follows:

1. The magistrate judge's Report and Recommendation is adopted and incorporated by reference in this order.

2. Defendant's motion for stay of criminal forfeiture (doc. 367) and his motion for immediate release on bond (doc. 368) are denied.

DONE AND ORDERED this 13th day of January, 2011.

/s/ M. Casey Rodgers
M. CASEY RODGERS
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES
OF AMERICA

VS

KENT E. HOVIND

CASE NO
3:06cr83/MCR/EMT
3:10cv478/MCR/EMT

REFERRAL AND ORDER

Referred to
Judge M. Casey Rodgers on February 3, 2011
Motion/
Pleadings: MOTION FOR RECONSIDERATION
Filed by Defendant on 2/3/11 Doc.# 383
RESPONSES:
_____ on _____ Doc.# _____
_____ on _____ Doc.# _____
_____ Stipulated _____ Joint Pldg.
_____ Unopposed _____ Consented

JESSICA J. LYUBLANOVITS
CLERK OF COURT

/s/ Katherine V. Goodman
Deputy Clerk: Katherine V. Goodman

ORDER

Upon consideration of the foregoing, it is ORDERED this 3rd day or February, 2011, that:

The relief requested is DENIED.

/s/ M. Casey Rodgers

M. Casey Rodgers
United States District Judge